No. 76-1636

In the Supreme Court of the United States

OCTOBER TERM, 1976

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation; **CENTRAL ARIZONA DENTAL SOCIETY**, an Arizona Non-Profit Corporation; **AMERICAN DENTAL ASSOCIATION**, an Illinois Non-Profit Corporation,
Petitioners,

vs.

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 6, 1977, and the denial of the petition for rehearing on March 1, 1977.

OPINIONS BELOW

There was no formal opinion of the United States District Court for the District of Arizona. However, the District Court did enter a minute order dismissing the amended complaint which was reported at ¶60,229 of 1975-1 Trade Cases, and is reproduced in Appendix A to this petition.

The majority opinion of the Court of Appeals reversing the District Court, as well as the dissenting opinion, are reported at 549 F.2d 626, 632 (1977). The opinions are reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1977 (App. B, *infra*). A timely petition for rehearing was denied on March 1, 1977 (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), subject all non-commercial activities of professional associations, including specifically in this case dentists' membership requirements, to a full evidentiary hearing under Sections 1 and 2 of the Sherman Act.

2. Is it sufficient under the Sherman Act for purposes of interstate commerce to allege simply that the petitioners engage in interstate commerce by using interstate facilities and collecting dues from dentists when the respondents have only an intrastate practice.

STATEMENT OF THE CASE

Petitioners, the American Dental Association ("ADA"), the Arizona State Dental Association ("ASDA"), and the Central Arizona Dental Society ("CADS"), are three voluntary professional dental associations. The ADA's constitution and by-laws provide that dentists in a given state may form state associations known as constituent societies and that in conformity with a plan approved by the state association, local associations or component societies may be formed. (R. 358-364) ASDA and CADS thus became constituent and component societies of the ADA.

Since the petitioners are purely voluntary associations, dentists need not join them in order to practice their profession in Arizona or any other state.

Respondents, four dentists who practice solely within the State of Arizona, have brought this action contending that the ADA constitution and by-laws violate §§ 1 and 2 of the Sherman Act because respondents have to pay dues to all three associations if they wish to join any one of the associations. (R. 318)

The respondents further alleged that although membership in CADS and ASDA is valuable to them, they derive no benefits from membership in ADA. (R. 322-323)

Although this case comes to this Court by way of a motion to dismiss, discovery was conducted in the trial court. The record, therefore, shows that the three associations engage for the most part in the same kinds of activities which generally are directed to improving the science of dentistry, although ADA's activities are, because of its national character, more extensive and nationwide in scope. The foregoing is accomplished in a great variety of ways including publication of profes-

sional material, scientific lectures and becoming involved in the legislative process where necessary to protect the public with reference to oral health. (Resps.' Answers to Interrogatories; R. 193, 200-01) In addition, when respondents were asked to detail wherein the ADA's activities were in opposition to the best interests of the respondents and the public, the interrogatory answers indicate that respondents were opposed to the growth of third party and/or group practice and in favor of usual and customary fee plans. (R. 200-02)

The allegations used by respondents to show a substantial effect on interstate commerce were that dues collected in various states are sent to the ADA's headquarters in Illinois (R. 329-330); that the ADA sends speakers to numerous states, that it sends its publications across states, that it sends accreditation representatives to hospitals in many states, and that it provides its members with insurance. (R. 330)

The District Court allowed petitioners' motions to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure, stating in its minute order that the antitrust claims should be dismissed because "the activities complained of do not effect interstate commerce and the procedures involved in joining professional associations do not constitute 'trade or commerce' within the purview of the antitrust laws." (App. A) The United States Court of Appeals for the Ninth Circuit reversed in a two to one decision. (App. B) A petition for rehearing was denied. (App. C)

REASONS FOR GRANTING THE WRIT

THE QUESTIONS ARE SUBSTANTIAL

This petition raises questions of obvious national importance involving the application of the antitrust laws to clearly non-commercial activities of professional associations. Since the decision by this Court in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), there have been an enormous number of cases brought, both private and government, under the antitrust laws against professional associations and professions.* The only guidance that inferior federal courts have had to work with in applying the Sherman Act to these cases has been footnote 17 of

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* See, *e.g.*, *Bank Building & Equipment Corp. of America, et al.*, v. *National Council of Architectural Registration Boards and West Virginia Board of Architects, et al.*, 1975-1 Trade Cas. ¶60,108 (D.D.C. 1975); *U.S. Dental Institute* v. *American Assn. of Orthodontists*, 396 F.Supp. 565 (N.D. Ill. 1975); *United States* v. *American Society of Anesthesiologists, Inc.*, 75-4640 (S.D. N.Y. 1975); *United States* v. *San Diego County Veterinary Medical Association*, 75 1076-N (N.D. Cal. 1975); *United States* v. *Alameda County Veterinary Medical Association*, 75-2398 (N.D. Cal. 1975); *United States* v. *American Pharmaceutical Association and Michigan State Pharmaceutical Association*, G-75-558-CA 5 (W.D. Mich. 1975); *In the Matter of the American Medical Association, et al.*, D. 9064 (F.T.C. 1975); *State of Ohio* v. *Ohio Medical Indemnity, Inc.*, 1976-2 Trade Cas. ¶61,128 (S.D. Ohio 1976); *United States of America* v. *American Bar Association*, Civil No. 76-1182 (N.D. Ill. 1976); *United States* v. *Texas State Board of Public Accountancy*, Civil No. A-76-CA-219 (W.D. Texas, 1976); *United States* v. *Illinois Podiatry Society, Inc.*, 77 C 501 (N.D. Ill. 1977).

the *Goldfarb* decision.* As a result in at least two places in the lower court's opinion in this case, the Ninth Circuit indicated the lack of guidance available in this important area (App. B 12, 15).**

The confusion which exists in this area can be seen by examining the post-*Goldfarb* decisions which have been reported. The United States Court of Appeals for the District of Columbia Circuit apparently believes that under certain limited circumstances the *per se* rule is fully applicable to the activities of professionals, but, significantly, leaves open the question of whether the antitrust laws apply to all aspects of professional activities. See, *United States* v. *National Society of Professional Engineers*, 1977-1 Trade Cas. ¶61,317 at 71,072 (D.C. Cir. 1977). The District Court for the Northern District of Florida, in a boycott case, applied a new form of the *per se* rule which allows professionals to maintain a good faith de-

* "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." 421 U.S. at 787-88 n.17.

** Because of the lack of guidance in this area, the Court of Appeals was forced to turn to this Court's opinion in *Cantor* v. *Detroit Edison Co.*, ... U.S. ....., 96 S.Ct. 3110 (1976). The Court of Appeals apparently believed that *Cantor* should be interpreted to indicate that the sense of the Court is that the antitrust laws should be read broadly. However, *Cantor* bears no relevance to this case.

fense in a *per se* situation. See *Feminist Women's Health Ctr., Inc.* v. *Mohammad*, 415 F.Supp. 1258, 1263, 1269-70 (N.D. Fla. 1976). In *Veizaga* v. *National Board for Respiratory Therapy*, 1977-1 Trade Cases, ¶61,274 at 70,870 (N.D. Ill.), the District Court observes that if professional activity was of a "commercial" nature, a full scale *per se* rule is applicable, but if professional activity is "non-commercial", the rule of reason must be applied. The instant case presents the Court with an opportunity to explain and clarify the application of antitrust laws to professionals and, likewise, to begin to establish some outer limits to the scope of the Sherman Act as applied to non-commercial professional activity.

The decision rendered by the Court of Appeals is erroneous because it conflicts, in principle, with this Court's opinion in *Goldfarb* as well as with decisions rendered by other federal courts. The Court's opinion in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), did not authorize antitrust attacks on all of the non-commercial membership policies of professional organizations. *Goldfarb* only held that certain "commercial" or "business" aspects of legal practice are subject to antitrust regulation and accordingly that a bar association cannot promulgate a minimum fee schedule for title searches. See 421 U.S. at 787, n. 17. The holding in *Goldfarb* is consistent with other federal decisions which require a showing of intention to affect commercial aspects of a profession before the antitrust laws will be applied to professionals. See, *e.g.*, *Marjorie Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970); *College Athletic Placement Service, Inc.* v. *National Collegiate Athletic Association*, 1975 Trade Cases, ¶60,117 (D.N.J. 1974), *aff'd. without opinion*, No. 74-1904 (3d Cir. 1974).

Moreover, when the *Goldfarb* decision is viewed in its historical perspective, it is nothing more than a logical evolution of the decisions of the Supreme Court and inferior federal courts which have held that professionals were subject to the application of the antitrust laws when their activities involved a commercial aspect of their practice or when their activities imposed a restraint on third parties. See, *e.g., American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943); *Northern California Pharmaceutical Ass'n* v. *United States,* 306 F.2d 379 (9th Cir. 1962); *Levin* v. *Doctors Hospital, Inc.,* 354 F.2d 515 (D.C. Cir. 1965); *Phi Delta Theta Fraternity* v. *J. A. Buchroeder & Co.,* 251 F.Supp. 968 (W.D. Mo. 1966). The majority opinion in the instant case is a wide departure from this natural evolution.

Substantial Practical Problems

This case further graphically illustrates the substantial practical problems caused by the absence of clear rules in the professional antitrust area. The interpretation of the Sherman Act used by the Court of Appeals applies the Act to long-standing membership rules which were by no means intended to harm respondents' competitive positions and respondents have not alleged otherwise. Even though the rules do not affect the commercial aspects of dental practice, petitioners will be subjected to the burdensome defense of an antitrust suit.

If a motion to dismiss is denied to the petitioners on these facts, the motion to dismiss is virtually unavailable to professional groups in antitrust actions. Under the logic of the Court of Appeals opinion, all types of organizations will be subjected to burdensome lawsuits. A country club could, for example, be sued by an individual who wishes to play golf on its course but does not wish

to become a member. A private club could be sued by an individual who wishes to eat lunch with the members but cares nothing for membership in the main organization. This opinion will also allow an individual who wishes to belong to the American Bar Association's Antitrust Section without joining the American Bar Association to argue that a dual membership requirement constitutes an illegal tying arrangement. We could go on and on with this parade of horribles. These illustrations assume that plaintiffs in these hypothetical cases will allege that they will gain some benefit from this limited contact with the country club, professional association, etc., but that full membership is not important to them and will also allege a substantial impact on interstate commerce.

The present state of the law will open the proverbial floodgates to expensive, unmeritorious lawsuits which lower courts will be unwilling to dismiss through summary motions.* These are substantial enough reasons to merit review of this decision.

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* Surely the Court of Appeals did not intend to interpret the Sherman Act in such a way that it would infringe on First Amendment Rights. The Act, of course, should extend no further than is necessary to vindicate the Government's interest in it. *United States* v. *National Society of Professional Engineers,* 1977-1 Trade Cas. ¶ 61,317 (D.C. Cir. 1977). However, an application of the Sherman Act which dictates membership policies to an organization may infringe on the group members' rights to free association under the First Amendment to the United States Constitution. The structure of the ADA, as mandated by its members through its By-Laws, (R. 358-364) reflects the way that its members feel that it will best fulfill the object of the Association, which is to "encourage the improvement of the health of the public, and to promote the art and science of dentistry. (R. 95) The members' right to repre-

(footnote continued)

Interstate Commerce

An additional reason for granting certiorari in this case is to review the standard of interstate commerce applied by the Court of Appeals. An examination of the interstate commerce allegations in respondents' complaint (R. 349-352) clearly indicates that respondents' position for purposes of interstate commerce is that *because the ADA engages in interstate commerce by using interstate commerce facilities and by collecting dues from dentists, this in and of itself is the requisite impact on interstate commerce.* The dissenting opinion as well as earlier decisions of the 9th Circuit Court of Appeals such as *Page* v. *Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961), reject this approach to subject matter jurisdiction. The simple fact of the matter is that the respondents have not alleged any nexus whatsoever with interstate commerce. Unfortunately, the majority opinion has ignored the complaint allegations and has used speculation to find a probable impact on interstate commerce (App. B 9, fn. 4).

(footnote continued)

sent their interests by promoting the art of dentistry has constitutional significance. Examples of this representation include the ADA's efforts to see that dentists retain complete legal as well as professional responsibility for providing prosthetic services (R. 98), and the ADA's efforts to keep its members informed about legislation that may have an impact on the profession (R. 102). See, *e.g., Thomas* v. *Collins*, 323 U.S. 516 (1944); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967). Forcing the dental profession to organize itself in some other way will limit the funds it has effectively to petition the government in furtherance of its stated objective. (R. 330-31)

As the dissenting opinion stated at App. B 19-20:

> "The claim here is that the ADA membership requirement somehow restrains plaintiffs' practice of dentistry. Yet plaintiffs do not claim that their dental practices involve interstate commerce. This distinguishes the instant case from *Goldfarb* . . . .
> "The Supreme Court cautioned [in *Goldfarb*] that there may be legal services that have no nexus with interstate commerce and therefore are beyond the reach of the Sherman Act."

This Court's opinion in *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), is easily distinguishable because respondents did not allege that their practices were in or affected interstate commerce. Moreover, the position of the Court of Appeals is inconsistent with the decisions of other circuits. See, *e.g., United States* v. *Bensinger Co.*, 430 F.2d 584, 585 (8th Cir. 1970); *Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975).

CONCLUSION

Because of the unusual importance of the questions presented in this case as well as the fact that of the four judges, including the trial judge, who have handled this case, two of the judges have found a claim for relief and two have not, we respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

[¶60,229] Vernon S. Boddicker, et al. v. Arizona State Dental Association, et al.

U. S. District Court, District of Arizona. No. Civ. 72-259. Minute entry dated March 3, 1975.

Craig, D. J.: Hearing had on defts' Motion to Dismiss pltfs' First Amended Complaint. Carl Divelbiss present for pltf, Peter Sfikas present for defts. It is ordered that the Motion to Dismiss is granted as follows: (1) the anti-trust claim should be dismissed because the activities complained of do not affect interstate commerce and because the procedures involved in joining professional associations do not constitute "trade or commerce" within the purview of the anti-trust laws; (2) the constitutional due process claims are dismissed due to the absence of any state action in the activity complained of; and (3) the claims pursuant to the state law are dismissed due to the absence of any federal claims to which the state claims could be pendent.

APPENDIX B

BODDICKER v. ARIZONA STATE DENTAL ASS'N

Amended March 1, 1977.

Vernon S. BODDICKER, Richard W. Peay, Hugh L. Thompson and Dwight G. Hudson, Plaintiffs-Appellants,

v.

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation, Central Arizona Dental Society, an Arizona Non-Profit Corporation, American Dental Association, an Illinois Non-Profit Corporation, Defendants-Appellees.

No. 75-1846.

United States Court of Appeals, Ninth Circuit.

Jan. 6, 1977.

Licensed dentists brought action alleging that agreement to require membership in national dental association as condition precedent to membership in local dental associations and participation in their programs and activities created an anticompetitive tying arrangement in violation of the Sherman Anti-Trust Act. The United States District Court for the District of Arizona dismissed the complaint for lack of subject matter jurisdiction, and plaintiffs appealed. The Court of Appeals, Sneed, Circuit Judge, held that complaint which alleged arrangement

whereby local dental associations required membership in national association as condition precedent to membership in local associations and participation in their programs and activities and which alleged that plaintiffs, dentists, were prevented from participating in local associations' programs and activities because of their failure to pay dues to national association set forth practices not beyond reach of the Sherman Anti-Trust Act; and that such arrangement was not so obviously designed to improve dental services to the public as to warrant dismissal of complaint under the "learned profession" exception to the Sherman Act.

Reversed and remanded.

Fitzgerald, J., filed a dissenting opinion.

1. Courts—406.5(6)

For the purposes of a review of a dismissal on the pleadings, Court of Appeals would accept as true plaintiffs' material allegations in their first amended complaint.

2. Commerce—62.10

Jurisdictional reach of the Sherman Act is coterminous with Congress' constitutional power to regulate commerce. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

3. Commerce—62.10

Presence of Sherman Act jurisdiction depends on whether it is within power of Congress to regulate defendant's conduct of which plaintiff complains; congressional power exists when conduct exerts substantial economic effect on interstate commerce. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

4. Monopolies—28(6.2)

Complaint which alleged that agreement by national dental association and local dental associations to require membership in national association as condition precedent to membership in local associations created anticompetitive tying arrangement by coupling participation in local associations' beneficial programs to membership in national association and which alleged that plaintiffs, dentists, were excluded from participating in programs and activities of local associations because of their failure to pay dues to national association set forth practices not beyond reach of the Sherman Anti-Trust Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

5. Monopolies—12(17)

To survive a Sherman Act challenge, a particular practice, rule or regulation of a profession, whether rooted in tradition or pronouncements of its organizations, must serve purpose for which profession exists, to serve the public; that is, it must contribute directly to improving service to the public; those which only suppress competition between practitioners will fail to survive challenge. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

6. Monopolies—28(6.8)

Arrangement whereby local dental associations required membership in national dental association as condition precedent to membership in local association and participation in their programs and activities was not so obviously designed to improve dental services to the public as to warrant dismissal under the "learned profession" exception to Sherman Anti-Trust Act of complaint charging that such arrangement created anti-competitive tying arrangement in violation of Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7. Federal Civil Procedure—1773

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

8. Monopolies—28(7.5)

Licensed dentists who brought action alleging that agreement whereby membership in national dental association was required as condition precedent to membership in local dental associations and participation in programs and activities of local associations created anticompetitive tying arrangement in violation of Sherman Anti-Trust Act had burden of proving their case in chief by preponderance of evidence. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the District of Arizona.

Before GOODWIN and SNEED, Circuit Judges, and FITZGERALD,* District Judge.

OPINION

SNEED, Circuit Judge:

This case comes before us as an appeal from a dismissal by the district court of plaintiffs' amended complaint for lack of subject matter jurisdiction under §§ 1 and 2 of the Sherman Act[1] and for failure to state a claim upon which

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* Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

[1] 15 U.S.C. §§ 1, 2 (1970).

relief could be granted.[2] Plaintiffs, licensed dentists within the State of Arizona, alleged that the American Dental Association (hereinafter referred to as the "ADA"), the Arizona State Dental Association (hereinafter referred to as the "ASDA"), and the Central Arizona Dental Society (hereinafter referred to as the "CADS"), have agreed among themselves to require membership in the ADA as a condition precedent to membership in the ASDA and the CADS, thus creating an anticompetitive tying arrangement by coupling participation in the local organizations' beneficial programs to membership in the ADA. Plaintiffs contend that this practice violates §§ 1 and 2 of the Sherman Act. The case involves two questions: whether plaintiffs' amended complaint adequately alleges a restraint of trade substantially affecting interstate commerce, and whether dentistry as a "learned profession" is exempt from the application of the Sherman Act.[3]

I. *The Facts.*

[1] For the purposes of a review of a dismissal on the pleadings, we accept as true plaintiffs' material allegations in their first amended complaint. *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Mandeville Island Farms,*

[2] The district court minute entry indicated that:

"[T]he antitrust claim should be dismissed because the activities complained of do not affect interstate commerce and because the procedures involved in joining professional associations do not constitute 'trade or commerce' within the purview of the antitrust laws . . . ."

[3] Plaintiffs also demand attorney's fees. It is inappropriate at this stage of the proceedings to discuss the propriety of such relief.

Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948).

Defendants ASDA and CADS are non-profit corporations organized under the laws of Arizona. Briefly summarized, the identical objectives and purposes of the ASDA and the CADS are to improve public health and the profession of dentistry by encouraging research, disseminating new knowledge in the profession, advancing the standard of dental education, enlightening the public in relation to oral hygiene and advanced dental service, and promoting and maintaining a high order of professional excellence. Membership in the ASDA and the CADS is not a prerequisite to the practice of dentistry in Arizona; plaintiffs, however, derive substantial benefits from such membership including participation in continuing education programs, group insurance, the exchange of information with and the referral of patients by fellow members, and the entry into various specialty organizations of dentistry. Pursuant to the by-laws of the ADA and the ASDA, a dentist may not become or remain a member in good standing in the ASDA or the CADS without also being a member of the ADA. The by-laws of the ADA designate the ASDA as a constituent society; the by-laws of the ASDA designate the CADS as a component society. The ASDA and the CADS remit the due which they collect on behalf of the ADA to the ADA at its central office in Illinois. Plaintiff Vernon S. Boddicker tendered the annual dues for the ASDA and the CADS, excluding the annual dues for the ADA; the CADS rejected this tender and with the ASDA dropped him from their rolls. Plaintiffs Richard W. Peay and Hugh L. Thompson paid under protest the annual dues of all three organizations in order to retain their status as members in good standing of the ASDA and the CADS.

Defendant ADA is a non-profit corporation organized under the laws of the State of Illinois. It provides a large range of services for dentists across the nation. A sampling of its nationwide activities is as follows: the publication and dissemination of journals, a newspaper, and newsletters, the conducting of dental aptitude tests, the accreditation of dental programs for hospitals, the providing of insurance programs for its members, and the dispatch of speakers to various states. As a result of its system of designating local organizations as constituent societies, which in turn require membership in it as a condition precedent to constituent society membership, the ADA collected in annual dues for 1972 an amount in excess of $6,000,000.

According to the amended complaint, expulsion from the local societies for failure to pay the ADA's dues will impair the ability of plaintiffs to practice dentistry in that they will be prevented from participating in the programs and activities of the ASDA and the CADS. Moreover, plaintiffs alleged that payment of dues to the ADA for which they receive no benefit is an unreasonable condition to membership in the ASDA and the CADS, and that this financial burden is passed on to the consumer in the form of increased dental costs. They also allege that the practice of dentistry throughout the nation is similarly affected.

II. *Jurisdiction.*

[2] In enacting the Sherman Act, Congress intended that the jurisdictional reach of the Act be coterminous with Congress' constitutional power to regulate commerce. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co., supra; United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944);

Rasmussen v. *American Dairy Ass'n,* 472 F.2d 517 (9th Cir. 1972), *cert. denied,* 412 U.S. 950, 93 S.Ct. 3014, 37 L. Ed.2d 1003 (1973).

[3] This court has traced the history of the coordinated expansion of the Commerce Power and the reach of the Sherman Act many times. We need not retrace it here. The presence of Sherman Act jurisdiction depends on whether it is within the power of Congress to regulate the defendants' conduct of which the plaintiffs complain. The answer is clearly affirmative. Congressional power exists when the conduct exerts a "substantial economic effect" on interstate commerce. *Wickard* v. *Filburn,* 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Rasmussen* v. *American Dairy Ass'n, supra.* Viewed from the jurisdictional standpoint of the Sherman Act, the Supreme Court recently indicated that the critical inquiry is "the adequacy of the nexus between [defendant's] conduct and [the] interstate commerce that is alleged in the complaint." *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. at 742, 96 S.Ct. at 1851 n.1. The nexus is unquestionably adequate here. The multistate scope of the ADA's membership, programs, and dues arrangements with local societies demonstrates this. These activities make possible a flow of funds, both from the individual dentists to the ADA and from the ADA to others, that substantially affects interstate commerce.[4] Moreover, the

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[4] In addition, plaintiffs contend that expulsion from the local societies will diminish their practice and professional reputation. A less vigorous dental practice necessarily includes the use of fewer supplies, less equipment, etc. Although the amount of interstate commerce affected by the deterioration of three dentists' practices may seem insubstantial, like effects on the practices of similarly situated dentists across the nation probably will result in the altered flow of dental supplies in interstate commerce. *See, Doctors, Inc.* v. *Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3rd Cir. 1973).

exclusion of the plaintiffs from the ASDA and the CADS pursuant to the dues arrangement can be considered "an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states."[5] In any event, at this stage of the proceedings, we cannot say that the challenged practices are more tenuous and remote from interstate commerce than were the practices of lawyers successfully challenged under the Sherman Act in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781-85, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

[4] Therefore, we hold that the allegations contained within the first amended complaint set forth practices not beyond the reach of the Sherman Act.

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[5] *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 297, 65 S.Ct. 661, 89 L.Ed. 951 (1945), *quoted* in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Plaintiffs argue that the success of defendants' agreement is dependent upon the ability of defendant ADA to impose similar agreements on all local and state societies. Thus, the ADA has the weapon of potential ostracism from the dental community in its arsenal to coerce plaintiffs and to implement their program.

Furthermore, plaintiffs' decidedly local status does not prevent them from availing themselves of the antitrust laws. *See Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). In *Lehrman*, Gulf Oil practiced a price support system throughout the southwestern states. A one-station operator challenged this practice as violative of section 1 of the Sherman Act. On the jurisdictional question, the Fifth Circuit found that the price support network in effect "throughout the Southwest" constituted the applicable "contract, combination, or conspiracy," *id.* at 32, and held that jurisdiction was present in spite of plaintiff's inherently local status. *Cf. Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). *See also, Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948).

III. *The Learned Profession Exemption.*

To dispose of the second question which this case presents, *viz.* whether dentistry is exempt from the Sherman Act as a "learned profession," we must consider primarily two recent Supreme Court decisions.

The first is *Goldfarb* v. *Virginia State Bar, supra,* in which the Court renounced an unlimited exemption from the Sherman Act for "learned professions." It stated:

> The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . . Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged upon us would be at odds with that purpose. 421 U.S. at 787, 95 S.Ct. at 2013.

In addition, it held that attorneys engaged in "commerce" when, under the circumstances of the case, they examined land titles in exchange for money and that the conduct of the Fairfax County Bar and the Virginia State Bar in publishing and enforcing minimum fee schedules amounted to price fixing in violation of section 1 of the Sherman Act.

The Court, however, did not hold that professions and their practices should be analyzed for Sherman Act purposes precisely as are ordinary commercial enterprises. This is made clear by the opinion's footnote 17 which read as follows:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated

> in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. 421 U.S. at 787-88 n.17, 95 S.Ct. at 2013.

This footnote, however, offers little guidance with respect to the manner in which a particular practice of a profession should be approached to determine its compatibility with the Sherman Act other than to draw attention to the "public service aspect, and other features" of the profession.[6]

In some respects *Cantor* v. *Detroit Edison Co.*, —— U.S. ——, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) provides a portion of the additional guidance that is required by the problem of meshing the Sherman Act with proper professional practices. The guidance it supplies consists of the fact that a majority of the *Cantor* court, under the circumstances of the case, refused to immunize from a Sherman Act challenge a practice of a public utility approved by, and unalterable without the consent of, the state public

[6] More guidance may be forthcoming. The Supreme Court recently decided to hear a case that challenges disciplinary rules controlling advertising by attorneys on the grounds that they violate the antitrust laws and the First and Fourteenth Amendments. *Bates* v. *Arizona State Bar*, 555 P.2d 640 (Ariz.Sup.Ct., 1976), *cert. granted*, —— U.S. ——, 97 S.Ct. 53, 50 L.Ed.2d 73 (1976). The Arizona Supreme Court held that the anti-trust attack must fail for three reasons: first, that the control of advertising is distinguishable from the price fixing arrangement in *Goldfarb*; second, that the state bar's actions are exempt as a state action under *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); and third, that no legislative body may interfere with the Arizona Supreme Court's reasonable regulation of its integrated bar.

service commission.[7] According to the plurality, the exemption from the Sherman Act available in *Cantor* extended no further than "was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' " *Id.* —— at ——, 96 S.Ct. at 3120. Under this test the plurality of four found the practice violative of the Sherman Act and a majority of six Justices agreed with the result.[8] The involvement of the state

[7] Pursuant to an order of the Michigan Public Service Commission, Detroit Edison provided light bulbs to its customers for no additional charge. It included, however, the cost of the light bulbs in its operating costs; as a result, the approved rates compensated for this additional cost. Plaintiff contended that the defendant was using its monopoly power in the distribution of electricity to restrain competition in the light bulb market; defendant interposed the defense that conduct required by state law is exempt from the Sherman Act. The plurality held that the conduct might be exempt if the private party had merely followed the command of the state; Detroit Edison, however, had participated in the formulation of that order to such an extent that the Court found that as a private party Detroit Edison had exercised a "sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Cantor* v. *Detroit Edison Co.*, —— U.S. at ——; 96 S.Ct. at 3118. The Court next addressed the question of the propriety of the superimposition of antitrust standards on conduct already being regulated under a different standard. It rejected the simplistic view that the fundamental inconsistency of the two standards prohibited the application of the antitrust laws.

Instead, the Court concluded that the light bulb program was not a necessary element of the regulatory scheme and that it would not be inconsistent to compel the utility to follow antitrust norms in business activities that are outside the realm of its natural monopoly.

[8] The Supreme Court employed a similar analysis in *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976). *Abbott Laboratories* involved

(footnote continued)

through its regulation of the practice afforded no immunity.

Goldfarb and *Cantor* make clear that neither an expansive "learned profession" nor equally expansive "state action" exemption exists to shelter the practices being challenged in this case. However, we believe, as already indicated, that the Supreme Court does not require that the practices challenged here be treated the same as would

(footnote continued)

a determination of the extent to which the Nonprofit Institutions Act exempted certain sales from the application of the Robinson-Patman Antidiscrimination Act. The Nonprofit Institutions Act limits the exemption to "purchases of their supplies for their own use by schools, . . . hospitals, and charitable institutions not operated for profit." The exempt status of the sales by defendant pharmaceutical companies to nonprofit hospitals hinged upon the Court's construction of the phrase "their own use." In construing this phrase, the Court recognized that the Nonprofit Institutions Act creates only a limited exemption; thus, the status of the purchaser as a nonprofit hospital does not entitle defendant sellers to a blanket exemption for all of their sales to such a purchaser. The Court then studied each category of a nonprofit hospital's drug usage to determine whether the conduct was such that it became "a part of and promote[d] the hospital's intended institutional operation in the care of persons who are its patients." *Id.* at 14, 96 S.Ct. at 1314. Therefore, when the hospital used the drugs as a necessary component to its role as a hospital, the Court held that the sale of these drugs to the hospital was exempt from Robinson-Patman; contrariwise, where the hospital's use was unnecessary to its basic function, the Court held that Robinson-Patman was applicable to sales to the hospital of drugs so used. The Court perceived the fundamental inquiry to be the necessity of the use to the functioning of the exempt institution.

be proper if dentistry were merely a commercial enterprise.[9]

[5] As we interpret the Court, to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, *viz.* to serve the public. That is, it must contribute directly to improving service to the public. Those which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of the ends that both the professions and the Sherman Act serve.[10]

We recognize this interpretation provides only the principle to be employed in deciding specific cases. It is not a blueprint which will resolve all controversies and by which the professions can check their structures to determine whether they comply with the Sherman Act. Any such blueprint must await additional guidance by the Supreme Court and the resolution of specific cases by this and other courts.

[9] See the distinction drawn by the Chief Justice Burger between the commercial practices of pharmacists and the professional services of physicians and lawyers in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 1831, 48 L.Ed.2d 346 (1976).

[10] In an exclusive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded:

> "[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare." Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.Law & Econ. 7, 10 (1966).

[6-8] At this juncture we can only hold that the arrangements of which the plaintiffs complain are not so obviously designed to improve dental services to the public as to permit us to sustain a motion to dismiss the complaint. A complaint should not be dismissed for failure to state a claim " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. at 746, 96 S.Ct. at 1853, *quoting Conley* v. *Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). We cannot say that the complaint fails to meet this modest standard. Further proceedings will provide the defendants the opportunity to demonstrate to the extent possible the manner in which the challenged arrangements promote the improvement of dental services to the public and the plaintiffs the opportunity to show to the extent possible the manner in which they suppress competition between practitioners of dentistry.[11]

REVERSED and REMANDED.

FITZGERALD, District Judge, dissenting:

This action arises from the fact that membership in the American Dental Association is a requirement for membership in the Arizona State Dental Association and the Central Arizona Dental Society. A licensed, practicing dentist in Arizona, such as plaintiffs, cannot belong to the State (ASDA) or local (CADS) society without also tend-

[11] The plaintiffs, of course, retain the burden to prove their case-in-chief by a preponderance of the evidence. *See Ramsey* v. *United Mine Workers,* 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971). *See also, Chisholm Bros. Farm Equip. Co.* v. *International Harvester Co.,* 498 F.2d 1137 (9th Cir.), *cert. denied,* 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974).

ering dues for membership in the ADA. The ASDA and CADS collect annual ADA membership dues from their members and remit to the ADA. Plaintiffs object to the requirement of paying the ADA dues and complain that it violates sections 1 and 2 of the Sherman Act.

Goldfarb v. *Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), makes clear that learned professions, including dentistry, are not beyond the reach of the Sherman Act. In *Goldfarb,* the professional conduct alleged to violate the Sherman Act was price fixing for legal services through use of a minimum fee schedule. The Virginia Bar argued for a wholesale exemption of legal profession activities from antitrust regulation, based on the rationale that competition is inconsistent with the practice of a profession since profit is not the principal goal of professional activities, which is to provide services necessary to the community. Recognizing this as the classic basis advanced to distinguish professions from trades, the Court observed that the rationale loses much of its force when used to support fee control activities. The Court noted that the practice of law as a profession has a business aspect; the exchange of legal services in return for the client's money is "commerce." However, the Court cautioned against automatically applying antitrust concepts from other areas to the professions. The fact that a restraint operates upon a profession as distinguished from a business is relevant in determining whether the particular restraint violates the Sherman Act. 421 U.S. at 787 n.17, 95 S.Ct. 2004.

In sum, I believe that *Goldfarb* narrowly holds that certain "business" or "commercial" activities of professionals are subject to antitrust regulation. Minimum fee schedules are obviously related to the commercial aspect of

professional practice. *Goldfarb* instructs that any alleged restraint operating upon a profession should be closely examined in order to determine whether it restrains competition in professional services and thus involves the commercial aspect of professional practice.

The restraint imposed upon the dentists in the present case is simply that unless they belong to the American Dental Association, and pay its membership dues, they may not be members of either the state association or the local dental society. If the dentists fail to pay the ADA dues, they cannot participate in the activities of the state or local groups or attend seminars conducted by the various specialty professional and technical groups and societies in the several states. They may, however, continue to practice dentistry and to charge for these services as they see fit.

It is not alleged that the "restraint" consisting of the dual membership requirement functions to eliminate competition between dentists in providing dental services, or to restrict consumer choice of dental services. By contrast, the price fixing condemned in *Goldfarb* and the other cases[1] relied upon by the dentists are classic conspiracies restraining competition in services, and *per se* violations of the Sherman Act under established antitrust principles.

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[1] *United States* v. *Nat'l Soc'y of Professional Eng'rs.*, 389 F. Supp. 1193 (D.D.C. 1974) (National Society rules prohibited members from engaging in competitive bidding for engineering services); *United States* v. *Oregon State Bar*, 385 F.Supp. 507 (D.Ore. 1974) (minimum fee schedule); *United States* v. *Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950) (fixing of real estate commissions); *N. California Pharmaceutical Ass'n* v. *United States*, 306 F.2d 379 (9th Cir. 1962) (fixing prices of precompounded prescription drugs).

Moreover, plaintiffs do not claim that the ADA membership requirement is designed for any purpose other than to promote the improvement of dental services. Membership dues paid to the American Dental Association support its nation-wide activities including the administration of dental aptitude tests, the accreditation of dental programs, and the publication and dissemination of professional journals. These activities are obviously designed to benefit the profession and improve the practice of dentistry. To the extent that this may be accomplished, the public is served.

The trial judge, as I understand his ruling, did not hold that learned professions are totally outside the scope of the Sherman Act. Rather he concluded that the particular professional activity at issue, the procedures and requirements for joining professional associations, falls outside the purview of the antitrust laws. I agree. *Goldfarb* does not go as far as to include within the scope of the Sherman Act professional activity, such as the ADA membership requirement, which has no alleged purpose or effect of suppressing competition between practitioners.

I would affirm the district court on another ground. Contrary to the majority conclusion, I do not believe the amended complaint alleges a trade restraint substantially affecting interstate commerce.

The amended complaint alleges that the defendant ADA engages in interstate commerce by using interstate communications facilities and by collecting dues from dentists and sending representatives to different states. However, the question is not simply whether the defendant engages in interstate commerce, but whether the alleged restraint substantially affects interstate commerce. The claim here is that the ADA membership requirement somehow re-

strains plaintiffs' practice of dentistry. Yet plaintiffs do not claim that their dental practices involve interstate commerce. This distinguishes the instant case from *Goldfarb*, wherein the legal services, although performed in state, were an integral part of interstate real estate transactions.[2] 421 U.S. at 784, 95 S.Ct. 2004. The Supreme Court cautioned that there may be legal services that have no nexus with interstate commerce and therefore are beyond the reach of the Sherman Act. 421 U.S. at 785, 95 S.Ct. 2004.

In an attempt to show the requisite impact on interstate commerce, plaintiffs herein allege that they cannot attend out of state seminars conducted by various specialty and technical groups unless they pay the ADA dues. This alleged ineligibility to attend seminars does not amount to sufficient impact on interstate commerce. Significantly, plaintiffs do not even assert a claim for the amounts they have paid in membership dues to the ADA because the cost of membership is passed on to the public, thereby occasioning no loss to the plaintiffs. I agree with the district court's conclusion that the complaint does not adequately allege a restraint of trade substantially affecting interstate commerce.

I would affirm.

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[2] *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) is also readily distinguishable from the instant case. The complaint in *Rex Hospital* alleged that defendants conspired to block the proposed expansion of plaintiff's hospital facility, and that plaintiff's facility purchased 80% of its supplies from out of state and derived a large share of its insurance revenue and finances from out of state. The alleged conduct of defendants thus adversely affected the very substantial volume of interstate commerce in which the plaintiff's hospital engaged.

APPENDIX C

March 1, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON,

Plaintiffs-Appellants,

vs.

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation,

Defendants-Appellees.

NO. 75-1846

ORDER

Before: GOODWIN and SNEED, Circuit Judges, and FITZGERALD,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested

a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

For further clarification, however, the majority opinion is amended by adding the following footnote at page 10, line 14 after "dentistry."[11]"

> "[11] The plaintiffs, of course, retain the burden to prove their case-in-chief by a preponderance of the evidence. *See* Ramsey v. United Mine Workers, 401 U.S. 302 (1971). *See also,* Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137 (9th Cir.), *cert. denied,* 419 U.S. 1023 (1974)."